

**REPORT AND RECOMMENDATIONS
RELATING TO THE PROBATE CODE**

**NEW JERSEY LAW REVISION COMMISSION
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INTRODUCTION AND SUMMARY

At present, there is an inconsistency between the New Jersey Probate Code and the New Jersey Parentage Act. The Probate Code, N.J.S. 3B:5-10, establishes standards for the determination of whether a child born out of wedlock is a child of the father for the purposes of intestate succession. The Parentage Act, N.J.S. 9:17-38 et seq., establishes standards and procedures for the determination of parentage of a child for every purpose. As a result, under the literal terms of the conflicting laws the determination of a child's parentage might differ depending upon whether the issue was being adjudicated before or after the death of the disputed parent. The conflict in the two statutory schemes could cause inequitable and inconsistent results in the determination of this important issue. The later expression of legislative intent on the subject of disputed parentage is the Parentage Act, which reflects a modern view that the parent-child relationship extends equally, irrespective of the marital status of the parents. Due to the inconsistency in the two statutory schemes, however, the possibility exists that the older and more restrictive view embodied in the Probate Code might be applied to determination of parentage in situations involving intestate succession.

The two acts are inconsistent in a number of ways. The most significant difference is in terms of burden of proof. The Parentage Act includes a whole series of presumptions relating to various fact situations and, in the absence of these situations, provides for determination of parentage by preponderance of the evidence. N.J.S. 9:17-43c. The Probate Code, in contrast, requires the establishment of the parent-child relationship by clear and convincing proof. N.J.S. 3B:5-10. The Parentage Act also includes specific rules for the determination of whether the husband of a child's mother is the father of that child. These rules differ from and are superior to the unclear, and perhaps circular, provision of N.J.S. 3B:5-10a which provides that a child is the child of the husband where "natural parents" marry before or after the birth of a child.

Cases where the inconsistencies between these two statutory provisions are significant in the determination of the case cannot be expected to be frequent; however, even prior to the effective date of the Parentage Act, one such case arose. In Matter of Estate of Calloway, 206 N.J. Super. 377 (App. Div. 1986), the court attempted to harmonize the two provisions using the presumptions of the Parentage Act to meet the proof standard of the Probate Code. Id. at 381-82. While that approach led to a satisfactory result in Calloway, it cannot be expected to do so in general. The two statutes are inconsistent; the version of the Probate Code chosen for N.J.S. 3B:5-10 was never intended to be enacted in jurisdictions which accepted the Parentage Act. See the two versions of Uniform Probate Code, sec. 2-109, included as an appendix to this report. The Comment to the Uniform Probate Code, sec. 2-109, makes this intent clear:

The approval in 1973 by the National Conference of Commissioners on Uniform State Laws of the Uniform Parentage Act reflects a change of policy by the Conference regarding the status of children born out of wedlock to one which is inconsistent with Section 2-109(2) of the Code as approved in 1969. The new language of 2-109(2) conforms the Uniform Probate Code to the Uniform Parentage Act.

The inconsistency between these two sections appears to have arisen from an error. The Uniform Probate Code provides two alternative sections. One is to be used where the Parentage Act is in effect, and the other where it is not. At the time the Probate Code was enacted in New Jersey, the Parentage Act had not yet been proposed. As a result, the Legislature chose the version of the Uniform Probate Code which reflected the lack of a Parentage Act. When the Parentage Act was enacted later in 1983, the Probate Code should have been amended to replace what is N.J.S. 3B:5-10 with the version of the Uniform Code which made reference to the Parentage Act. That was not done. Correction of this section is necessary to carry out the intent of the Legislature embodied in the Parentage Act.

The best solution to this statutory inconsistency is to amend the Probate Code to reflect the form of the Uniform Probate Code intended to be used with the Parentage Act. This decision involves accepting the Parentage Act as the preferable statutory scheme for establishing parent-child relationships. That decision would be in accord with the modern principle that the parent-child relationship extends equally, irrespective of the marital state of the parents. See, N.J.S. 9:17-40. It would accept the more clear and specific rules for the determination of parent-child relationships of the Parentage Act and its reflection of the modern principle that scientific tests can be used to make an accurate determination of parentage in the majority of cases.* There appears no reason to prefer the Probate Code form now in place as N.J.S. 3B:5-10, which is no longer recommended by the Uniform Law Commissioners. See Comment to Uniform Probate Code, sec. 2-109, quoted above.

For these reasons, the Commission recommends amendment of N.J.S. 3B:5-10. Legislation to that purpose has been prepared by the Commission and is appended to this report.

* The most significant difference between the New Jersey Parentage Act and the Uniform Parentage Act from which it is derived is the increased reliance of the former on scientific tests to determine parentage. See, e.g., N.J.S. 9:17-51 providing for human leucocyte antigen, electrophoresis and isoelectric tests rather than blood group tests referred to in Section 11 of the Uniform Act. The New Jersey Act assumes the reliability of this sort of testing; see, N.J.S. 9:17-48d. This difference appears to reflect not a difference in policy but a change in technology. See Commissioners' Comment to Section 12 of the Uniform Act.